No. 12511.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

HOME LOAN BANK BOARD, *et al.*,

Appellants,

vs.

PAUL MALLONEE, *et al.*,

Appellees.

FEDERAL HOME LOAN BANK OF SAN FRANCISCO, *et al.*,

Appellants,

vs.

FEDERAL HOME LOAN BANK OF LOS ANGELES, *et al.*,

Appellees.

PETITION FOR REHEARING BY APPELLEE ROBERT H. WALLIS.

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Preliminary Statement.

The disposition of Appellee Wallis in the opinion of the Court herein filed April 2, 1952, is set forth in said opinion at pages 52 and 53 as follows:

> "And we think it quite clear that the pleadings of the subsidiary and interpleading litigants Wallis and Home Investment Company (to which we refer in Part I of this opinion) failed to tender an issue or issues which presented a claim upon which relief could have been granted by the court—this, if for no other reason than the posture of the claims of the Mallonee-Association group then before the court which revealed unresolved doubts as to the control of Ammann over the property and affairs of Association of which the claims of Wallis and Home Investment are part and parcel. If the relief then

demanded from the court by the Mallonee-Association group was improperly and unlawfully granted by the court, it is certain that the ancillary and subsidiary claims of these litigants which arose only out of the claims of Association, were without substance in law. The validity of their claims rested upon the validity of the claims of Association. If the claims of Association were untenable in law, it is obvious that the claims of these litigants could rise no higher than their source. Settlement of the issue as to the validity of the conservatorship and the extent of the Conservator's control of Association's affairs would have reached every area of the controversy and resolved the basic issues presented in the contentions of these two parties.

"Predicated on the views expressed above we now hold that the Court should have dismissed all of these original (five) actions for the reason that they failed to state a claim upon which relief could be granted and for the further reason that Association had failed to exhaust tendered and available administrative remedies under the valid and applicable rules and regulations of Administration above mentioned."

If the decision of this Court is to stand and be a precedent it will, in effect, destroy the entire system of checks and balances of the Government of the United States. If a wrongdoer seeking to justify his unlawful acts may simply, by virtue of his holding a public office, raises fictitious charges of others committing wrongs, thereby sets himself up as the judge to dispose of the charges against himself, the result is tyranny.

The aforesaid disposition of his cross-claim in the nature of interpleader the appellee, Robert H. Wallis, respectfully contends deprives him of his legal remedy of

his right to interplead and in support thereof argues as set forth below.

I.

The Court Erred in Stating the Wallis Claim Rises or Falls With a Resolving of Ammann's Rights as Conservator.

There is no direct relationship between the validity of Ammann's appointment and the right of the Association to pay counsel to defend it against seizure. This right of defense is not governed by the ultimate success or failure of that defense. If this right of defense is lost the individual may not defend against the government without administrative leave.

II.

Wallis Has a Statutory Right to Interplead.

Statutory authority to interplead is contained in 28 *U. S. Code Annotated,* Sec. 1335 (formerly 28 *U. S. C. A.,* Sec. 41(26)). This section specifically includes actions in the nature of interpleader. The sufficiency of the form or contents of the cross-claim of Wallis is not here under attack and was not questioned by this Court in its opinion herein and is therefore assumed to be adequate as to form and sufficiency. For brevity its sufficiency is not here argued, as its sufficiency to state a cause of action in interpleader is apparently admitted. The venue of this cross-action is established by 28 *U. S. C.,* Sec. 1397, and is not here attacked. That process under the cross-action of Wallis may and has issued outside of California together with the authority of the Court to restrain other proceedings is established by 28 *U. S. C. A.,* Sec. 2361, and is apparently not here questioned.

Abundant authority for the above statement can be furnished if questioned. Supporting citations are not here included only because the points are believed to be admitted by all parties and the decision to be bottomed on a different theory.

III.

Appellee Wallis Had a Right to Interplead Regardless of the Availability of Other Remedies.

This cross-complainant "had a right to resort to the remedy of interpleader regardless of what other remedies were available," as said in the case of *Hunter v. Federal Life Insurance Co.,* 111 F. 2d 551, 556 (1940), the District Court having assumed jurisdiction, the Circuit Court of Appeals, Eighth Circuit, stated the District Court "has the power to grant full relief, including the allowance of a proper set-off against any particular claim growing out of any contract which entitled a claimant to pursue the fund."

See also:

American Surety Co. v. Calcasieu Oil Co., 3 Fed. Supp. 939, 941.

There can be no question but that the cashier's check interplead is property within the meaning of the act.

Omaha National Bank v. Federal Reserve Bank, 26 F. 2d 884.

IV.

The Jurisdiction of the District Court Having Been Established and the Court Being a Court of Equity May and Should Determine All of the Issues of the Litigation at Least to the Extent Necessary to Determine the Issues Raised in the Wallis and Other Cross-actions.

This point was argued at length in the Wallis brief herein at pages 13-21, in the Association's brief herein at pages 123-159, and in the brief of the Shareholders Protective Committee herein at pages 44-50.

We respectfully submit the various arguments of appellees all to the same effect are not refuted and establish the lawful right of Wallis and other interpleaders to a judgment on the merits in the Court below.

V.

The Right of Wallis to a Determination of the Issues Raised in His Cross-action Has Been Decided in His Favor.

This appellee was attorney for Long Beach Association at the time of its seizure in May of 1946, and as such, received a $50,000.00 cashier's check from said Association for use to defend said Association against confiscation. Appellee deposited said cashier's check into the registry of the Court below in interpleader, intact and uncashed, and asked that the Court make allowances to the attorneys defending said Association.

Such allowances were made, and both the United States Supreme Court in *Ex parte Fahey,* 332 U. S. 258, 91 L. Ed. 2041, in June of 1947, and this Court of Appeals in

December of 1947, refused to stay or vacate such allowances.

The present Court of Appeals' opinion indicates that dismissal of this appellee's cross-claim in interpleader should have been made because it "failed to state a claim upon which relief could be granted and for the further reason that Association had failed to exhaust tendered and available administrative remedies."

This appellee's cross-claim in interpleader was before the United States Supreme Court and was there attacked by appellants in 1946 and 1947, both on appeal and by writs. The cross-claim has not been amended in any way since these attacks and the United States Supreme Court remand to the District Court for "other administrative or JUDICIAL PROCEEDINGS which may be warranted by law." (Emphasis ours.)

This appellee was subjected to a demand by the conservator Ammann, a citizen of Maryland, for delivery of the $50,000.00 cashiers' check to said Ammann, and was sued by the Mallonee-Shareholders' Protective Committee, citizens of California, for an order of court requiring him to use said check for defense of the Association.

Appellants claimed that the Association must be completely defenseless after they seized it, that no assets could be used for the payment of expenses for the defense of the Association against the confiscation.

This appellee had no administrative remedies to exhaust. His duties, as an attorney at law, to defend said Association in court or to abandon it to confiscation were not to be decided at administrative hearings, nor were appellee's obligations as an attorney to defend said Asso-

ciation or to use the $50,000.00 appropriated for the Association's defense, to be decided by administrative proceedings.

This appellee was admitted as a member of the bar of the United States Supreme Court, and of the District Court at Los Angeles, by those Courts, and not by any administrative tribunals, and his obligations as such attorney can be decided only by those Courts.

Had appellee returned the cashiers' check as demanded by Ammann, no administrative hearing could have protected him against his liability to the Shareholders' Committee, if the Association was thereby rendered helpless in its defense; nor, had he cashed and spent the $50,000.00 cashiers' check, as demanded by the Shareholders' Committee, could the administrative hearing have determined the reasonableness, nor the amount of appellee's or any other attorneys' fees, for defense of the Association from confiscation.

In *Ex parte Fahey,* 332 U. S. 258 (1947), the Supreme Court said:

> "We hold that the appellants' grievance is one to be pursued by appeal . . . to the appropriate court . . ."

Thereafter, such appeal was taken in 1947 to this Court of Appeals and was dismissed.

The Supreme Court did not say that the administrative board should decide the amount of fees to be paid to the attorney suing that board for fraud.

In March of 1949, after the restoration of the Association to its founding management, the District Court heard applications by various counsel for allowance and determination of their attorneys' fees and expenses in the litigation resulting in the removal of the conservator.

An allowance of $540,000.00 was made by the District Court. Consent of the attorneys to vacate this allowance was sought by appellants.

Peyton Ford, the Assistant to the Attorney General of the United States, filed with the court below a letter by which he agreed on behalf of all appellants that,

> ". . . any further attorneys' fees shall be judicially determined in an adversary proceeding . . ."

Another portion of said letter provides:

> "If no settlement be reached, any additional fees shall be judicially determined in said litigation." [Appeal No. 12511, R. 6562-6564.]

Three years have now passed and no such settlement has been reached.

In connection with said letter, the Court found:

> "That this Court and the parties and all of them, relied upon said letter of said attorney Peyton Ford. Assistant to the Attorney General of the United States, . . ." [Appeal No. 12591, R. 299.]

By such letter and proceedings in reliance thereon, all questions concerning attorneys' fees and the payment thereof were submitted by appellants to the court below for judicial determination thereof.

Appellants by express written waiver of right of appeal [R. 6547-6550] or by dismissal of appeals, have consented to the payment of $260,000.00 thereof [R. 3550-3552] and in addition have approved payment by appellant San Francisco Bank of an additional $100,000.00. Who, among the parties and assets, is liable for payment of these and other expenses of litigation, is one of the issues yet pending for decision before said United States District Court.

VI.

The Instant Appeal Raises Only the Propriety of the Preliminary Injunction Restraining an Administrative Hearing and Does Not Encompass a Determination of Any Other Issue Including the Wallis and Other Cross-actions.

The record speaks for itself. If Los Angeles Bank is not concerned with this appeal then Wallis is not (Opinion herein, p. 59).

VII.

Appellee Wallis Is Entitled to a Trial in the Court Below Regardless of the Disposition of Other Pleadings in the Litigation.

In *Hunter v. Federal Life Ins. Co.,* 111 F. 2d 551 (C. C. A. 8, 1940), the Court stated:

> "*The jurisdiction of a federal court to entertain a bill of interpleader is not dependent upon the merits of the claims of the defendants.* Metropolitan Life Ins. Co. v. Segartis, D. C., 20 F. Supp. 739. It is our opinion that a stakeholder, acting in good faith, may maintain a suit in interpleader for the purpose of ridding himself of the vexation and expense of resisting adverse claims, even though he believes that only one of them is meritorious . . ." (Emphasis added.)

VIII.

Even a Dismissal of Action of Plaintiffs Would Not Defeat the Cross-relief in Interpleader Sought by Wallis and Other Cross-claimants

Dismissal of plaintiffs' original complaint or other parties pleadings for failure to state a cause of action for lack of jurisdiction does not justify dismissal of cross-claims, counterclaims, or cross-bills of other parties. Such is the rule in the Ninth Circuit and elsewhere.

See the case of:

Railway Express v. Jones, 106 F. 2d 341 (C. C. A. 7, 1939).

The Court stated at page 343:

". . . The Railway Express' right to file its interpleader is not established nor defeated by the merits of Plaintiffs' claim . . ."

and at page 345:

"By proceeding under the counterclaim of the Railway Express the jurisdiction of the Court will be unassailable, and the claims of all claimants may be litigated exactly the same as in a proper class suit.

". . .

"The orders appealed from are reversed with directions to permit the filing of the counterclaim and to proceed further in this suit on said counterclaim. . . ."

On the same point see also:

Isenberg v. Biddle, 125 F. 2d 741 (C. C. A., D. C., 1941),

at pages 743-744:

". . . The rule is that in such circumstances, when the counterclaim seeks affirmative relief, it is

sustainable without regard to what happens to the original complaint. Lion Mfg. Corp. v. Chicago Flexible S. Co., 7 Cir., 106 F. 2d 930, 933; Vidal v. South American Securities Co., 2 Cir., 276 F. 855, 874; Jackson v. Simmons, 7 Cir., 98 F. 768. In the Jackson case the Court of Appeals of the Seventh Circuit said: 'But a cross bill which seeks affirmative relief is in the nature of an original bill wherein the cross complainant is the actor. Such a cross bill is not dependent upon the original bill, is not subject to the control of the complainant in the original bill, and does not fall with the dismissal of the original bill, whether that dismissal be the act of the complainant or the act of the court.' 98 F. page 733. And see also Buffalo Specialty Co. v. Vancleef, D.C., 217 F. 91."

In the case of:

Vidal v. South American Securities Co., 276 Fed. 855 (C. C. A. 2, 1921) (rehearing, Jan. 11, 1922),

the Second Circuit had followed what it had thought to be the general rule that a cross-bill falls with the original bill, and had dismissed the counterclaims. However, on petition for rehearing, the court reversed itself on this subject and stated at pages 874 and 875:

"As the counterclaims set up causes of action within the jurisdiction of the court as a court of equity, and within its jurisdiction as a federal court because of the citizenship of the parties, . . . they should not have been dismissed, but should have been treated as original bills upon the dismissal of the original bill. . . ."

To the same effect, see also:

Barber Asphalt Corp. v. La Fera Grecco Contr. Co., 116 F. 2d 211 at 216 and 217 (C. C. A. 3, 1940).

See also the case of:

Lion Mfg. Corp. v. Chicago Flexible S. Co., 106 F. 2d 930 (C. C. A. 7, 1939).

In the case of:

San Diego Flume Co. v. Souther, 90 Fed. 164 (C. C. A. 9, 1898),

the District Court had dismissed both the original complaint and a cross-bill in equity on the ground that the original bill of complaint stated no facts that would justify the relief prayed for. The Ninth Circuit reversed and held the cross-bill stated a cause of action and had independent grounds of federal jurisdiction. It affirmed the dismissal of the original complaint but set aside the dismissal of the cross-bill (p. 171) and remanded the cause for further proceedings.

A rehearing was sought and granted, and in 104 Fed. 706 the court affirmed the correctness of its former ruling that the judgment of the trial court should be reversed as to the cross-bill and so ordered.

The District Court then proceeded on the cross-bill alone after dismissal of the original complaint and gave the cross-complainant the relief prayed for.

There was a second appeal to the Ninth Circuit, the opinion of which appears in 121 Fed. 374, and sustained the judgment in favor of the cross-complainant except for a modification on the amount of damages.

This decision was cited and followed in *Vidal v. South American Securities Co. (supra).*

IX.

Request for Stay of Mandate.

If the Court of Appeals intends to rule, as its opinion indicates, that appellee must submit for decision by the administrative hearing, the amounts and reasonableness of all attorneys' fees for the defense of the Association now sued for foreclosure of $7,000,000.00 of its assets by San Francisco Bank, this appellee respectfully urges the withholding of the issuance of the remand from the Court of Appeals. Such ruling is expressly contrary to *Ex parte Fahey,* 332 U. S. 258, 91 L. Ed. 2041, in which the United States Supreme Court denied writs against payment of the $50,000.00 of attorneys' fees in 1947, and is also in violation of the remand of this Court of Appeals in February of 1948, in Appeal No. 11751, wherein the previous appeals by appellants Ammann, *et al.,* were dismissed by this Court of Appeals.

Such ruling is further contrary to the denial of stay by this Honorable Court of Appeals, Justices Clifton Mathews, Albert Lee Stephens and William E. Orr, Justice Orr withdrawing and being replaced by Justice William Healy in Appeal No. 11751 in December of 1947.

Under these circumstances, return to Appellee Robert H. Wallis of the $50,000.00 cashier's check on deposit in the registry of the Court would be ineffective to discharge this appellee of liability, unless such return be ordered by the United States Supreme Court, in further proceedings under *Ex parte Fahey* (*supra*), wherein writ of prohibition, mandamus and/or injunction against the District Court proceedings on these very matters were denied.

Conclusion.

In conclusion, appellee, Robert H. Wallis, respectfully requests the opportunity to reargue in the Court of Appeals the possible effect of its opinion which:

1. Violates the mandate of the United State Supreme Court in the 1947 decisions of *Ex parte Fahey,* 332 U. S. 258, 91 L. Ed. 2041, and *Fahey v. Mallonee,* 332 U. S. 245, 91 L. Ed. 2030, by making administrative determination of attorneys' fees a prerequisite to interpleader of the $50,000.00 cashier's check; the subject of disputes as to ownership thereof, between the conservator who demanded it be returned to him, and the Shareholders' Protective Committee who demanded that it be expended to prevent the Association's confiscation;

2. Dismisses the pending actions and thereby takes from the Court issues concerning attorneys' fees submitted to that Court for decision by letter from the United States Attorney General, filed with the Court and relied upon by the Court and the parties in vacating a prior $540,000.00 award of attorneys' fees made by the Court after hearing;

3. Denies the statutory right of this appellee to interpleader protection against liability asserted by the wholly inconsistent and contradictory claims of conservator and the Shareholders' Protective Committee, and the multiplicity of actions which result;

4. Confronts Appellee Wallis with conflicting claims to the check deposited with the clerk. Should this cross-action in the nature of interpleader be dismissed he would be faced with multiple suits before he could safely himself take or deliver the money to anyone;

5. Requires that attorneys defending a savings association from confiscation and suing the administrative body for fraud, submit to that administrative body for decision the question of how much, if any, attorneys' fees can be paid to such attorneys;

6. Prevents any savings association from appropriating any attorneys' fees for its defense thereby rendering such appropriations subject to administrative proceedings and effectively denies right of counsel to a confiscated association, contrary to *Ex parte Fahey,* 332 U. S. 258, 91 L. Ed. 2041.

To force Wallis and the other appellees into the tender mercies of the wrongdoers themselves is not justice.

Respectfully submitted,

RAYMOND TREMAINE,
Attorney for Appellee Robert H. Wallis.

Certificate of Counsel.

I, Raymond Tremaine, pursuant to Rule 25 of the Rules of this Court, as counsel for appellee herein, Robert H. Wallis, hereby certify that in my judgment the foregoing petition is well founded. It is not interposed for delay.

RAYMOND TREMAINE,
Attorney for Appellee Robert H. Wallis.